IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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SUPPLEMENTAL STATEMENT OF THE CASE

We think the opening statement in petitioner's brief that respondents decided "to terminate" her employment "because she urged her principal to modify practices in her school which she believed to be racially discriminatory" is misleading and tends to create an erroneous impression that could carry forward in the reader's mind [Petitioner's brief, 3].[1]

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[1] Petitioner's present counsel took no part in the case at a trial level and must perforce rely upon the Court of Appeal's opinion. We do not intend to, and do not suggest that the wording of this opening paragraph is intentional.

First, petitioner's employment was not "terminated";[2] her contract had expired, she had no tenure, had no right to be tendered another contract, and she was simply not re-hired. [Appendix, 8a]. The distinction is an important one.

Secondly, petitioner correctly states the findings of the District Court that the primary reason for not re-hiring petitioner "was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach", and that "the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were *capable* of interpretation as embodying racial discrimination." App. 8a-9a, 35a-36a. [Emphasis added.]

As we understand the decision of the Fifth Circuit, the substance is that the criticisms of petitioner as to the policies and practices of the school to which she was assigned were not protected by the First Amendment. We suggest that Judge Roney sums it up rather neatly in his concurring opinion, without being fancy, by simply saying:

> "* * * I think that there are probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in First Amendment terms". App., 26a.

As in *Schenck* v. *U.S.*, 249 U.S. 47 (1919) it is important to consider the factual circumstances surrounding the exercise of rights for which First Amendment protection is sought. As Mr. Justice Cardozo once ob-

[2] Under Mississippi law, a teacher may be "terminated" only for incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil, or other good cause . . ." Mississippi Code of 1972, § 37-9-59.

served before becoming a member of this Court, what is "reasonable" is "like a jewel that varies in color and content with its setting."[3]

The setting here is that respondents have an unbroken history of complying with the law in complete good faith. When "separate but equal" was the rule, facilities for black schools were equal to or better than those for white schools; when "freedom of choice" was the vogue, respondents had adopted such a policy even broader than that required in *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir., 1966), two years before standards were set by the courts; prior to the institution of this action, respondents had adopted a desegregation plan approved by HEW, modified only slightly by Judge Claude F. Clayton.[4]

Respondent district is a long, skinny, rural school district, extending some 40 miles north and south and varying in width from 10-12 miles to 2 miles (where it surrounds Greenville Municipal Separate School District). It has three attendance centers, Riverside (which includes the former Avon school) in the middle, O'Bannon some 11 miles to the north, and Glen Allan some 14 miles to the south. At the beginning of the 1969-70 school year, O'Bannon was predominantly black, Riverside had predominantly white and predominantly black schools, and Glen Allan had a predominantly white and an all black school. All three offered grades 1-12. In the middle of the 1969-70 session, under the orders entered January 12 and 21, 1970 [App. 2a-3a], all high school students from the entire district were assigned to Riverside, all elementary students divided between O'Bannon and Glen Allan.

[3] We remember this vividly from our law school days, but cannot locate the citation.

[4] Order entered by Judge Clayton on August 10, 1966, the relevant portions of which are reproduced in Appendix I.

This was done between the end of the first semester and the beginning of the second. All high school desks, lab equipment, library books, etc., had to be moved from O'Bannon and Glen Allan to Riverside, and all elementary paraphernalia from Riverside to O'Bannon and Glen Allan. Similarly virtually all teachers had to be reassigned, and virtually all students were snatched from familiar surroundings and thrust into classrooms with other students whom they did not know and in many cases put under teachers whom they did not know, all in the middle of the school year.

The result, understandably, was utter chaos. Under an agreed order entered on June 29, 1970, the district was reconstituted into three attendance centers with geographical zones, and all furniture, fixtures, equipment, library books, etc., were moved back whence they came. In the process, between the 1969-70 school year and the 1970-71 school year the district lost 17.8% of its black teachers, 52.8% of its white teachers, 5.8% of its black pupils and 56.7% of its white pupils.[5]

Petitioner's conduct must be considered in the light of conditions existing at Glen Allan school when it reopened for the 1970-71 session following these disruptive changes. As the District Judge put it,

> "The court is aware of the considerable problems which occurred in this school district during the establishment of a unitary system in the 1969-70-71 period. There were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation of the Western Line Consolidated School District. Most happily, the passage of time has dissipated the great majority of this friction." App., 35a.[6]

[5] Tables I and II, Stipulated Exhibit 1, CA 5th Appendix, 328, Appendix II.

Being more specific, when the 1970-71 session re-opened, when Leach became principal on October 8, 1970, the Glen Allan center had been without a principal for the first several weeks. His immediate problems

> "* * * included racial hostility, lack of discipline among the students, and lack of cooperation among the teachers. Shortly after his arrival as principal, Leach solicited greater cooperation at a teacher's meeting. Givhan [petitioner] implied at the meeting that she did not intend to cooperate very much, and Leach later held a private conference with her. Leach testified that at the conference Givhan told him that 'she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system.' Givhan denied making these statements." App., 5a.[7]

It is, or should be obvious that in the tense situation encountered by the principal, full cooperation of all was essential to maintain a strict discipline and to get on with the educational process in an orderly manner. Under such circumstances, petitioner's announced intention not to cooperate with the principal made at the faculty meeting, her controversy with the principal in a hallway (in the presence of students) over the giving of a six-weeks test, her arguments over work assignments for black NYC student workers,[8] and her objections to the

[6] Significantly, the improvement occurred *after* petitioner was not re-hired.

[7] As a specific example of petitioner's lack of cooperation, note the incident where she had protected a student during a weapons shakedown by concealing his knife. App. 6a, footnote 7.

[8] There were no white NYC student workers, so the assignment could not be said to be racially discriminatory.

assignment of a white to take up cafeteria tickets,[9] considered together, is fairly akin to "falsely shouting fire in a theater." *Schenck* v. *U.S.*, 249 U.S. 47, 52 (1919).

PRELIMINARY STATEMENT

As Judge Gewin stated below, "It is often said that hard cases make bad law." App. 19a. As Judge Roney, concurring, stated, ". . . I agree that the district court erred in casting this case in First Amendment terms." App. 26a.

The sad truth of the business is that this case, from start to finish, was tried as a *Singleton III*[10] case.

In the district court ruling from the bench [Appendix III], the judge called for briefs on the sole question of whether respondents' failure to rehire petitioner and her co-intervenor, Hodges, was a violation of the *Singleton III*-type order entered on January 12, 1970, specifically stating no argument was desired on whether there was any racial discrimination or on whether failure to re-hire petitioner was a violation of First Amendment rights. However, in rendering his decision, the district judge completely avoided the *Singleton III* issue and went off on the First Amendment grounds as to petitioner, which had not been seriously argued by either side and had not been briefed by either. Perhaps "vigorous and robust discussion" of the issues by opposing counsel might have shed some light.

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[9] The white was assigned by the District cafeteria supervisor at the request of the Glen Allan cafeteria manager (a black).

[10] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir., 1969) (en banc), *rev'd and remanded sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), *on remand*, 425 F.2d 1211 (5th Cir., 1970).

ARGUMENT OPPOSING CERTIORARI

I. First, We Should Determine What the Court of Appeals Did and Did Not Hold.

As we understand the decision under review, the court of appeals first determined it was not bound by the district court's legal conclusion petitioner's conduct was protected by the First Amendment, and then proceed with its own analysis of that conduct.

On petition for certiorari, the question before this Court is whether the decision conflicts with the decision of another court of appeals on the same matter, or whether it decided an important question which has not been, but should be settled by this Court, or in a way which conflicts with other applicable decisions of this Court. Rule 19, 1(b). This necessarily requires some consideration of petitioner's conduct vis-a-vis the First Amendment.

There can be no question from the record in this case but that petitioner was a highly vocal, militant teacher; it is equally clear, however, that in those instances where petitioner did act or speak out on issues of public concern, her First Amendment rights were meticulously respected. Specifically, (1) the instance where petitioner and others disrupted a PTA meeting at which plans for an ungraded elementary school system were being discussed, it was in protest over transfer (at the beginning of the 1969-70 session) of two black teachers from the predominantly black O'Bannon center to the predominantly white Riverside center;[11] and (2) the instance where it became necessary to advise petitioner and other teachers that their reporting to assigned positions (when the district was converted to a one-high school, two-

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[11] The transfer was to comply with an order entered August 22, 1969, requiring not less than six black teachers assigned to Riverside.

elementary school configuration, required under the order of January 21, 1970) was a condition of continued employment. The teachers had met, drawn up "protests", and a serious question had arisen as to whether they would report for work. Record, 189-192.[12]

Although it was the view of respondents that these instances were intended to and had the effect of heightening racial tension and making it more difficult to comply with specific directives of the district court, petitioner's First Amendment rights and those of the other teachers were respected. No disciplinary action was taken.

Going directly to the conduct treated by the district court and the court of appeals, although both disregarded the incident where petitioner protected a student during a weapons shakedown at Riverside in March, 1970 (where all the district high school students had been thrown together in the middle of the school year), by concealing a student's knife until completion of the search [App. 6a, footnote 7], because it did not occur while petitioner was at Glen Allan, we think that evidence relevant on two points: (a) it illustrates the lengths to which petitioner actually went in refusing to cooperate with the administration and in sabotaging efforts to maintain some semblance of an orderly educational process, and (2) it directly supports evidence that petitioner's announced intention was not to cooperate with the school administration [App. 4a, footnote 6; 5a].

This strips the case down to the incidents during the 1970-71 school session for which petitioner claims First Amendment protection. They are: (1) that black people be placed in the cafeteria to take up tickets, a job petitioner considered "choice";[13] (2) that the administrative staff be better integrated;[14] and (3) that black NYC workers be assigned semi-clerical office tasks instead of only janitorial-type work.[15]

[12] To avoid confusion, the Appendix filed with the Court of Appeals will be cited as "Record".

All three of these topics relate solely to the internal operation of the Glen Allan center. In point of fact, the principal had no alternative in any of the three areas under discussion. Assignment of the ticket-taker in the cafeteria was not under Leach's jurisdiction.[16] It does not appear anywhere in the evidence that the respondents could use more than one clerical employee on the Glen Allan administrative staff, and with three of four supervisory positions filled by blacks, about the only way the staff could be "better integrated" would be for the white

[13] The principal's undisputed testimony is that the district cafeterias were run by the district supervisor who assigned the white ticket-taker at the request of the Glen Allan cafeteria manager (a black) and that the management of the cafeteria was not under his jurisdiction. App., 7a. Although not in the record, the truth of the matter is that the black ticket-takers were replaced because *no* tickets were collected by them, and *everyone* was eating free. "Choice"?

[14] The court of appeals appears to be mislead as to what "all of the Glen Allan administrative and office personnel" consisted of. It did consist of Mr. Leach, white principal; one secretary, white; Ms. Hodges, black counselor; Mr. Givhan, black assistant principal; and Mr. Jackson, black elementary supervisor [Defendant's Answers to Interrogatories (First Set), served January 17, 1974]. 3 of 5 were black.

[15] As pointed out by the court of appeals [App. 7a], petitioner's protest was based upon her experience at Riverside the preceding year, where white NYC workers allegedly worked in the office and the blacks washed the windows; however, at Glen Allan (a much smaller school), there were no white NYC workers, the black NYC workers were not qualified for clerical duties and in fact were hired to do janitorial work.

[16] As principal, Leach certainly knew what was and what was not within the scope of his authority. Petitioner admittedly did not know. App., 7a, footnote 8. There is no evidence in the record that Leach *did* have such authority.

principal to resign; and, it appearing that there were no white NYC workers and that none of the black NYC workers were qualified for clerical work, the principal had no choice but to employ them in the jobs for which they were hired.

As a matter of plain common sense, it is difficult to see either the utility or the public interest in protecting rights to discuss issues, where no options exist.

We think the principal's views are fairly well summed up in these two quotations from the evidence:

> Q. And you agreed that she was a competent teacher? A. I said all along that Mrs. Givhan was a competent teacher, *if that is what she would have done instead of trying to run the school.*" (Emphasis added.) Record, 124.
>
> "Q. All right, sir. Now, based upon your associations with Mrs. Givhan, did you form any opinion as to whether the school could be successfully or unsuccessfully run with her present? A. When I was deciding on teachers for the following year and had to inform the Superintendent, who in turn would inform the Board, I decided that due to her antagonism and the problems I had had with her all year long, it would be impossible for me to carry on a successful school at Glen Allan the following year with her there. I had decided that if she were there I couldn't be there and carry out the duties, and I was placed there and I intended to do my job, and I felt like I could not do it with Mrs. Givhan there." Record, p. 135.

The other two topics considered by the court of appeals we would consider to be purely relating to the employment of petitioner, not matters of public interest, and not matters subject to First Amendment protection. They are: (1) the matter of the memorandum to all teachers reminding them of six-weeks' tests which petitioner

> "* * * apparently thought the memorandum was insufficient advance warning; [and] while students were changing classes she discussed (or perhaps argued) with Leach about the inadequate notice and whether she was to give a 'pop test.' Leach interpreted this challenge to him in front of students as reflecting her antagonism. Givhan in effect admitted the incident, but explained that her concern for timely notice was generated by the memorandum's subject relating to the more comprehensive semester, not six weeks', tests." App., 5a."[17]

and, (2) petitioner's refusal to administer a standardized achievement test."[18]

With this background, the court of appeals majority opinion holds that petitioner's conduct is not of the type protected by the First Amendment. Judge Roney in his concurring opinion states that there are probably many occasions where First Amendment protection reaches private expression, but agrees with the majority that petitioner's conduct does not fall within these "many occasions".

II. The Holding in This Case Does Not Conflict With the Decisions of Other Courts of Appeals on the Same Matter, Nor Does It Conflict With Other Applicable Decisions of This Court.

At the outset, we note that all of the court of appeals decisions which petitioner suggests are or may be in

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[17] It is faintly ridiculous for a teacher to complain of insufficient advance warning of *either* a six weeks' test or a semester test. Both are scheduled before school commences as a matter of routine and the nomenclature, in and of itself, constitutes "advance warning" of the time the test is due. *Neither* could be remotely considered a "pop test."

[18] There may be a conflict as to who ultimately administered the test, but there is no conflict in evidence of petitioner's refusal. Assuming she did, in fact, give the test, it was done only after another teacher had been assigned the task by the principal.

conflict with the decision under review were decided prior to *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and must be read in the light of that decision. As we understand *Doyle*, it holds that even if First Amendment protected conduct playing "a substantial part" in the board's decision not to renew the teacher's contract, *nevertheless* the teacher may not be placed in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. As re-stated by the Court, the teacher ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to re-hire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision. Prior to *Doyle*, where protected conduct was a substantial factor in the decision not to re-hire, the teacher automatically prevailed. The "second layer" of *Doyle* holds that the burden is properly on the teacher to establish (1) that his conduct was constitutionally protected *and* (2) that it was a "substantial factor" or "a motivating factor" in the District's decision not to re-hire. Once the teacher has passed these two hurdles, the burden passes to the district to show by a preponderance of the evidence. Consequently the court of appeals decisions cited by petitioner as conflicting with the decision under review must be considered as modified by *Doyle*.[19]

The case at bar does not conflict with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), involving a teacher's letter to the editor of the local paper critical of the manner in which past proposals to raise school revenues had been handled by the board and superintendent. We would regard this public comment on a public

[19] The case at bar was decided by the district court in 1975, prior to the *Doyle* decision. However, since the Fifth Circuit has held petitioner's conduct not protected by the First Amendment, *Doyle* does not come into play.

issue as First Amendment protected conduct, but would distinguish that type comment from internal criticism on issues where the principal had no alternate course and from petitioner's argument over a memorandum relating to administration of a six-weeks' (or perhaps a semester) test, and her refusal to administer an achievement test clearly within the scope of duties she was hired to perform. *Pickering* simply holds that once First Amendment protected conduct has been established, the interest of the teacher's constitutionally protected rights must be balanced against the interest of the state in getting the job done efficiently through its employee.

Ring v. *Schleshinger*, 502 F.2d 479 (D.C., 1974), went off on summary judgment, and was simply remanded for trial on the issue of whether the teacher was discharged in retaliation for First Amendment protected comment. The case does not stand for the proposition that the teacher's memorandum on her principal's incompetency and lack of ethics was protected conduct. In its decision, the court of appeals stated:

> "Mrs. Ring has yet to show that she was, in fact, so dismissed [for constitutionally protected conduct]. The District Court foreclosed any opportunity to make this showing when it granted summary judgment to the Government. We think that there is a genuine dispute as to whether appellant was dismissed on an impermissible basis—as a reprisal for the exercise of constitutionally protected right." 502 F.2d at 490.

In the case at bar, after a full trial, the court of appeals is unanimous in holding that petitioner's conduct was not protected.

Roseman v. *Indiana Univ. of Pennsylvania, at Indiana*, 520 F.2d 1364 (3d Cir., 1975), *cert. den.*, 424 U.S. 921 (1976), directly supports the decision before this Court, and does not conflict. In affirming, the court of appeals

first held that since the communications, made in a forum not open to the general public and concerning an issue of less public concern than *Pickering's*, "the First Amendment interest in their protection is correspondingly reduced." 520 F.2d at 1368. *Next*, the court observed that the communications would undoubtedly have the effect of interfering with harmonious relations with the teacher's superiors and co-workers. *Pickering* was distinguished on the dual grounds that Pickering's statements were not directed towards any person with whom he would normally be in daily contact in the course of his daily work as a teacher, and that that case did not involve a question of maintaining either discipline by immediate superiors or harmony among co-workers. Its final ruling was

> "For reason of these distinctions between the plaintiff's communications and the communications at issue in *Pickering*, we have concluded that plaintiff's communications fall outside the First Amendment's protection. Because they do, the University did not deny the plaintiff her First Amendment rights, even if it considered her statements in making its non-renewal decision." 520 F.2d at 1369.

In the case at bar, the undisputed testimony of the principal (quoted page 10, *supra*) is simply that petitioner was a competent teacher, *if* she would only attend to teaching and not try to run the school, but that when time came to recommend teachers for the coming year, he reached the conclusion that because of petitioner's antagonism and the problems he had had with her all year, he would be unable to run the school successfully the following year with petitioner continued in employment as a teacher. We think the overall flavor of this case supports that conclusion.[20]

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[20] Principals are not always as articulate on the witness stand as trial counsel might desire. We think, however, that a principal is better able to reach a reasoned administrative decision (necessarily a highly subjective one) on the basis of daily contact with a teacher, daily observation of demeanor and attitude, than is a trial judge bound by rules of evidence and forced to rely on secondhand reports. For example, the same words, delivered in a loud, arrogant tone in the context of the racially tense situation that existed at Glen Alian during 1970-71 may, and usually do, sound perfectly innocous when repeated in a court room.

Superficially, *Janetta* v. *Cole*, 493 F.2d 1334 (4th Cir., 1974), would appear to be in conflict with the case at bar, but the decision there is based upon specific findings of the district court that the expression of plaintiff was protected by the First Amendment, with which the court of appeals agreed, that the conduct did not adversely affect the efficiency of the fire department, and that the conduct was the *sole* reason for suspension. In this case, we have the conclusion of the court of appeals that First Amendment protection does *not* reach petitioner's conduct, which conclusion we submit is supported by the evidence discussed under Point I. We think the difference between the two cases is entirely factual and falls within the following language of this Court in *Pickering*:

> "• • • Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged." 391 U.S. at 569.

Janetta and *Roseman*, *supra*, reach different results in the application of *Pickering*, and of the two, we believe *Roseman* is the better reasoned and is more applicable to the factual situation in this case. We point out that even if petitioner's conduct may be considered protected, there remains the "second layer" of *Doyle* which would require remand to determine whether the decision not to re-hire would have been made anyhow.

Smith v. *Losee*, 485 F.2d 334 (10th Cir., 1973), is based upon a specific finding of fact that the actions of the defendants in denying plaintiff permanent status and employment were taken to punish him for having supported a particular candidate in a state political election, for having opposed the administration in his capacity as president and member of the executive committee of the faculty association, and for having expressed opposition to "some administration policies" at faculty meetings. It was specifically found that no other justifiable grounds existed for denying tenure or employment, and that the action was taken with actual malice (sufficient to support punitive damages). We would certainly agree that the right to support the political candidate of one's choice is a First Amendment protected right. We would also agree that the right to oppose policies taken by one in his capacity as a member of the executive committee and of the faculty association would be protected, particularly where it is presumably a function of the committee and association to participate in the formulation of policy. We point out that the discussions concerned policies where alternates were available; that is, the discussions were to assist in a decision as to which of several policies should be adopted, or to suggest reconsideration of an existing policy. However, in the case at bar, there is no such clear cut First Amendment right as the right to support the candidate of one's choice, and the principal here *had no choice* but to implement district policy in the employment of NYC workers, in the assignment of the ticket-taker, or in the employment of additional help on the administrative staff. We do not believe the case is in conflict with the decision at bar.

Hostrop v. *Board of Junior College Dist. No. 515, etc., Ill.*, 471 F.2d 488 (7th Cir., 1972), involved a dismissal for failure to state a claim upon which relief could be granted, and contains three separate grounds for reversal: possible First Amendment protection, deprivation

of "liberty" in the sense that plaintiff's standing in the community was damaged by a charge of an unsavory character trait without procedural due process, and deprivation of contract property interests without procedural due process. The court of appeals, in dealing with the First Amendment basis for reversal, simply held that the allegations of the complaint that plaintiff, a college president, had circulated the offending memorandum as a part of his official duties and that it was only several days after it had become public that members of the Board told him he had no right to express his views in such a way and that he would be terminated because of this expression. The holding of the court was that these facts, as alleged, clearly showed arbitrary action on the part of the defendants which the *due process* clause was meant to protect, but pointed out that the defendants, on trial, might demonstrate that plaintiff's circulation of the memorandum was evidence of insubordination [21] and actually produced the harmful effects which, under *Pickering*, could justify the discharge. The court's dicta on the First Amendment aspect are thus ambivalent. Its *holding* is a due process holding, not a First Amendment holding, and the decision cannot be said to conflict with the decision under review.

III. The Decision of the Court of Appeals Under Review Does Not Involve an Important Question of Constitutional Law Which Has Not Been, But Should Be, Settled by This Court, Nor Does It Conflict With Applicable Decisions of This Court.

First, the decision under review is carefully limited to the facts then before the court by this language:

> "But before doing so [i.e., striking the *Pickering* balance] we must determine whether on the facts of

[21] Cf.: petitioner's refusal to administer the standardized achievement test and her challenge to the principal of the memorandum on six weeks' (or perhaps semester) test in the presence of pupils.

this case the teacher had a First Amendment interest *as a citizen* in making complaints to the principal." App. 13a. Emphasis is in the original.

Moreover, reading the decision under review in the light of the facts of the case, to which the ruling is limited both by the opinion, itself, and by general rules of case-law construction, it is apparent that it has the support of *Pickering*, whether or not petitioner's conduct has First Amendment protection.

The principal, in transmitting his decision not to rehire petitioner to the district superintendent, stated:

> "Ms. Givhan is a competent teacher, however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. *She is overly critical for a reasonable working relationship to exist between us.* She also refused to give achievements tests to her homeroom students." [May 1, 1971.] App., 42, emphasis added.

In complying with petitioner's request for a statement of the reasons she was not re-hired, the superintendent wrote [July 23, 1971]: [22]

> "(1) a flat refusal to administer standardized National tests to the pupils in your charge; (2) an announced intention not to cooperate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year." App., 4a.

Looking at the general guidelines of *Pickering*, [391 U.S. at 569-570], it is immediately apparent that the

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[22] The intervention complaint was filed September 14, 1973 [Record, p. 8], more than two years following the dates given. These reasons were no after thoughts.

petitioner's conduct was directed towards the principal with whom she would normally be in daily contact in the course of her work as a teacher; that there was a serious question of maintaining discipline and harmony among coworkers; and that it can be persuasively claimed that personal loyalty of teachers to the school is necessary for proper functioning.

Indeed, we advance as axiomatic that the following criterion is an absolutely essential trait for a teacher:

> "6. *"Teacher-Administrator (Loyalty).* The degree of acceptance and execution of school policy and graceful fulfillment of an assignment is an indication of the loyalty exerted by a teacher to the school district. This should be the number one professional characteristic and is the leading factor in determining the success of an educational system."

Pickens v. *Okolona Municipal Sep. Sch. District*, 380 F. Supp. 1036, 1039-40 (N.D., Miss. 1974), affirmed, 527 F.2d 358, 360 (5th Cir., 1976) (Approving the above as a *Singleton III* objective criterior where a rating of 1 on a 1-5 scale meant that the teacher so evaluated would not be considered for reemployment.)

Therefore, it follows from the above and from our more detailed discussion of petitioner's conduct earlier in this brief that she was neither a "whistle blower" nor did her conduct remotely resemble "quiet dialogue through channels" as is suggested in the Petition at pages 7-8.

CONCLUSION

It is not enough to eliminate segregation "root and branch"; something must grow in its place. It is or should be apparent from the facts in this case that petitioner's conduct, at a critical time in the transition to a

unitary system, was calculated to and had the effect of making it more difficult for her principal to restore order and discipline at Glen Allan, and making it more difficult to establish and maintain an atmosphere within which a quality educational system could operate. Significantly, the district court noted the "several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of desegregation" [App., 35a] of the respondent district, and that "[m]ost happily, the passage of time has dissipated the great majority of this friction" [App., 35a]. It is also significant, that the dissipation did not occur until after the departure of petitioner from the system.

We note that in *Roseman, supra*, certiorari was denied by this Court, which may or may not indicate tacit approval of its holding that the interest in First Amendment protection is "correspondingly reduced" [520 F.2d at 1368] where communications [conduct] are in forums not open to the general public. We think that the conduct under review here smacks more of interference in matters *well beyond* the scope of petitioner's employment as a teacher of junior high English, and resistance to orders and instructions *within* the scope of her employment than it does of any right protected by the First Amendment. We again point out that when petitioner *did* exercise First Amendment protected rights by demonstrating against the transfer of black teachers during the fall of 1969, and by meeting with other teachers dissatisfied with the manner in which the district administration was complying with the mid-year directive to reconstitute the school configuration of the district, she did so with absolute impunity.

We respectfully submit that the petition should be denied.

Respectfully submitted,

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CERTIFICATE

I, J. ROBERTSHAW, counsel for respondent, do hereby certify that I have this date mailed the foregoing brief to Wilson-Epes Printing Co., Inc., 707 Sixth Street, N.W., Washington, D.C. 20001, in type-written form, via United States airmail, postage prepaid, with instructions to have the same printed, filed with the Court, served upon counsel for petitioner at the address shown below, and its affidavit of such service filed with this Court:

STEPHEN J. POLLAK, ESQUIRE
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

This 7th day of March, 1978.

/s/ J. Robertshaw
J. ROBERTSHAW

Appendices

APPENDIX I

EXCERPTS FROM MEMORANDUM OPINION RENDERED AUGUST 10, 1966

Five schools, located in Washington County, are operated by WLCSD: Avon Elementary School and Riverside Attendance Center in Avon, Mississippi; Moore Elementary School and Glen Allen Attendance Center in Glen Allen, Mississippi; and O'Bannon Attendance Center in Greenville, Mississippi. Avon Elementary, Moore Elementary and O'Bannon were all Negro schools and Riverside and Glen Allen were all white schools, prior to the 1965-1966 school year. On 5 August, 1965, the Board of Trustees of WLCSD adopted a desegregation plan based on freedom of choice which provided for desegregation of grades one and two in the 1965-1966 school year; grades three, four, five and six in the 1966-1967 school year, and all remaining grades in the 1967-1968 school year. The plan was approved by the Commissioner of Education of the Department of Health, Education and Welfare on 31 August, 1965. An earlier step to desegregation had been taken by WLCSD on 5 November, 1964, through the adoption of a resolution on transfer policy, under which pupils would be initially assigned as in the past but all resquests for transfers would be "handled strictly on the merits, without regard to race," giving consideration only to the "availability of class space, economic transportation, and similar factors." The resolution further provided that "in case of doubt, the request will be approved."

At the beginning of the 1965-1966 school year fourteen Negro pupils enrolled in the first and second grades of previously all white Glen Allen Attendance Center. Three of the fourteen later withdrew from school, leaving eleven Negro pupils enrolled in previously all white schools at the time of the hearing. Three of these children resided

within the town of Glen Allen; all others resided in Issaquena County. No Negro pupils attending previously all white schools who were eligible for bus transportation under state law resided in Washington County.

Record, 14-15

The desegregation plan adopted by WLCSD in August 1965 did not include, in terms, the transfer policy established by the board of trustees in November 1964. However, after the hearing on the motion for a preliminary injunction, WLCSD took several steps to give adequate notice of the transfer policy and it was also included verbatim in a revised version of the plan. Throughout this controversy WLCSD has relied on this transfer policy to meet plaintiffs' objections that the plan did not provide for desegregation of grade twelve as well as the lower grades, as required by *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965) (hereafter *Singleton I*) and related cases; that no absolute right to transfer to schools from which the applicant had been excluded because of race or color was given, *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir. 1966) (hereafter *Singleton II*); and that pupils new to the system were not given a freedom of choice regardless of grade, *Singleton I*, supra.

With respect to the right to transfer regardless of grade so as to escape the effect of unconstitutional racially based assignments, the position of WLCSD is well taken. *Singleton II*, supra, delineates an absolute right, in individuals who have been racially assigned, to transfer to schools from which they were excluded because of race. The WLCSD transfer policy, drafted prior to *Singleton II*, in effect creates a right in all students to transfer on request, without regard to race, subject only to reasonable non-racial administrative standards. If anything,

the WLCSD policy is broader than that required by *Singleton II*, supra. This court's approval of this aspect of the plan is buttressed by the praiseworthy demonstration of good faith on the part of the WLCSD defendants. On the record now before the court, there is no evidence that any Negro pupil has attempted to make use of the right to transfer. Unless and until plaintiffs can show that a pupil has applied for transfer from a school to which he was assigned because of race or color to a school from which he was excluded or would have been excluded because of race or color; that the application to transfer was denied; and that the race or color of the pupil has some bearing on the denial, there would be no basis for finding that the present transfer policy does not meet the requirements of *Singleton II*.

But the transfer policy does not remedy the failure to desegregate grade twelve. While the free right to transfer may make it *possible* for every Negro pupil now enrolled to have the benefits of a desegregated education, more is required. *Singleton II*, supra, states the absolute right to transfer so as to escape from racial assignments and *in addition* reiterates the requirement of *Singleton I*, supra; *Price* v. *Denison Independent School District*, 348 F.2d 1010 (5th Cir. 1965), and related cases, that desegregation start at both ends of the grade structure. Under a freedom of choice plan, a partially desegregated school system may still assign pupils on a racial basis in the grades not yet desegregated. Without the free right to transfer, pupils so assigned must stay in the schools to which they were assigned. The inclusion of the free right to transfer required by *Singleton II*, supra, does not prevent initial racially based assignments in segregated grades, but on the request of any pupil so assigned the school authorities must permit a transfer to cure the initial denial of his constitutional rights. In other words, pupils in desegregated grades must be given and must

exercise a free choice of schools; they can be assigned in no other manner. Pupils in still segregated grades need not be granted a free choice of schools unless they ask for it. Here, regardless of the freedom of choice available to all pupils on request, those eligible for enrollment in grade twelve must be included in the class of pupils who must be granted and must exercise that free choice of schools. Grade twelve must be formally desegregated in the coming school year.

In practice, it seems that pupils new to the system assign themselves to school by presenting themselves for enrollment at the school of their chioce. In form, the plan provides otherwise. Article II (c) requires such pupils to register in the school of their choice in the desegregated grades "and at the school which they would have previously attended" in the segregated grades. Just as in the case of pupils in grade twelve, pupils new to the system must be required to exercise a free choice fo schools and may not be even initially assigned on the basis of race or color.

Total desegregation will be achieved by the 1967-1968 school year as required by *Singleton II*, supra, and four new grades are being desegregated in the coming school year, but the total number of grades desegregated in the penultimate year of the plan is only six. In this court's view of the cases, that number should be at least eight at this point unless special circumstances are shown to justify a lesser number. No such circumstances appear in this case and WLCSD must desegregate at least two additional grades in September 1966. One of these two must be grade twelve. Selection of the other grade will be left to the discretion of the board of trustees.

While defendants admit that heretofore there have been racial inequities in salaries of teachers, good faith efforts to achieve equalization were begun before the filing of this action. Beginning with the 1966-1967 school year, all

teachers are being paid in accordance with a racially non-discriminatory salary scale, and there is no need for injunctive relief in this area.

In response to requests made pursuant to Rule 36, F.R.Civ.P., plaintiffs admitted that physical facilities (buildings, classrooms, equipment, library facilities, cafeterias, etc.) of formerly Negro schools in WLCSD were substantially equal to or superior to like facilities of formerly white schools. They also admitted that pupil-teacher ratios in some white schools on occasion exceeded similar ratios at Negro schools, and vice versa. There is no evidence revealing any inequities in pupil-teacher ratios between comparable schools. They also admitted that all five schools are similarly accredited. The evidence with respect to services and activities, curricular and extracurricular, establishes that existing differences favor the formerly all Negro schools. As to curricular inequalities, any pupil, regardless of grade or race, must be allowed to transfer to obtain courses not available in the school to which the pupil was assigned. *Rogers* v. *Paul*, —— U.S. ——, 15 L.Ed.2d 265 (1965). The transfer policy discussed above adequately meets this requirement. There is no discrimination against plaintiffs and their class in per pupil expenditures of funds. There is no basis for injunctive relief as to any of these areas.

On 26 January, 1966, *Singleton II* required an "adequate start toward elimination of race as a basis for employment and allocation of teachers, administrators, and other personnel." WLCSD made such a start six months earlier with the adoption of Article VI of the plan, which provides:

> Assignment of personnel at all levels and to all positions shall be made without regard to race, color or national origin. The following steps will be taken immediately pursuant to this policy: Beginning the school year 1965-66 the separate In-Service Training Program for teachers—wherein workshops to study

problems relating to the schools are held—shall be eliminated and said program shall include all teachers of Western Line Consolidated School District, regardless of race, color or national origin. All system-wide faculty meetings will be desegregated.

Principals, teachers and other professional staff members will not be discharged or dismissed or demoted solely on the basis of race, color or national origin.

As to future years, all positions shall be filled on the basis of the best qualified person available for a particular post without regard to race, color, or national origin.

The faculties and staffs of the WLCSD schools are either all white or all Negro in accordance with the race of the majority of the pupils of each school. There is no evidence to show that this racial division is the result of any affirmative action taken by the WLCSD defendants since the adoption of the plan in August 1965, and it would appear that it is a residual product of the former policy of segregation, preserved by a combination of inertia and the local preferences of the employees. Plaintiffs have not shown that any employee has applied for a transfer to another school or that an applicant has sought employment in a position for which he or she was qualified, and that a transfer was refused or employment denied on the basis of race or color. On the other hand, services and programs for teachers and administrators have been conducted on a desegregated basis.

On the present record, and with a view toward the temporary nature of this disposition and the opportunity which the parties will soon have to seek revision of the decree to be entered, no other relief to plaintiffs should or will be granted at this time.

A decree will be entered in accordance with the foregoing.

Record, 18-25.

APPENDIX II

STIPULATED EXHIBIT 1

TABLE I

Analysis of Annual Changes Classroom Teachers,
WLCSD 1969-70 through 1973-74

	No. of Teachers		No. Leaving		% Turnover	
Session	Black	White	Black	White	Black	White
1969-70	73	40	9	16	12.3%	40.0%
1970-71	73	36	13	19	17.8	52.8
1971-72	75	50	14	13	18.7	26.0
1972-73	75	54	9	16	12.0	29.6
1973-74	70	50	9	15	12.9	30.0
1969-74	366	230	54	79	14.8%	34.3%

TABLE II

Population Changes
Classroom Teachers and Pupils, WLCSD
1969-70 through 1974-75

		Pupils		Teachers		
Session	% Black	Black	White	Black	White	% Black
Oct. '69	66.2%	1915	976	76	40	65.0%
Feb. '69	81.0	1803	423	73	40	64.6
Nov. '70	77.8	1757	500	73	36	67.0
Oct. '71	76.3	1677	516	75	50	60.0
Oct. '72	72.1	1579	610	75	54	58.1
Oct. '73	72.0	1597	620	70	50	58.3
Oct. '74	70.5	1388	581	68	48	58.6

TABLE III

Losses and "Hires", WLCSD Classroom Teachers
1969-70 through 1973-74

	Black			White		
After Session	Not Rehired	Other Losses	"Hires"	Not Rehired	Other Losses	"Hires"
1969-70	2	7	9	2	14	12
1970-71	5	8	15	1	18	33
1971-72	3	11	14	3	10	17
1972-73	2	7	4	3	13	12
1973-74	1	8	7	3	12	13

APPENDIX III

BY THE COURT:

• • • •

Now, the only question that I have in my mind at this time that prevents me from rendering a decision in this case is whether or not there was a compliance by the school district with reference to the provisions of the Singleton decree when it made the decision not to re-employ Mrs. Givhan in the 1971-72 school year.

The same thing applies to Mrs. Hodges in the 1972-1973 school year.

So I am going to ask counsel to give me a brief on that one point. Assuming for the sake of the brief, and for the sake of argument, that there has been a failure on the part of the plaintiff in the case to show by a preponderance of the evidence that the reasons or causes for the noncontinuance of these two teachers in this school system was other than the reasons given by Mr. Le[illegible]h.

In other words, assuming for the sake of argument that they were not employed because of those reasons and not because of any racial discrimination or violation of any First Amendment rights on the part of Mrs. Givhan, leaving those out of consideration. I don't care to have any argument about that, nor the law either, because I think I am fully informed on that.

Record, 324-325